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Low Kai Gie v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO P-05(M)-92–02 OF 2018
ABDUL RAHMAN SEBLI, ZABARIAH MOHD AND MOHAMAD ZABIDIN JJCA
22 NOVEMBER 2019

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Criminal Procedure — Trafficking in dangerous drugs — Appeal against conviction and sentence — Whether trial court correctly invoked presumption of trafficking against accused on finding he had mens rea possession — Whether accused's defence that drugs were not found on his person but inside a car was not evidence to rebut presumption of trafficking — Whether defence rejected because police did not arrest car owner who was with accused at material time — Whether accused had to be convicted for failing to rebut presumption of trafficking

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The appellant was convicted and sentenced to death by the High Court for trafficking in 146.9g of methamphetamine, contrary to s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). The trial court found that the appellant had mens rea possession of the drugs he was carrying in a sling bag at the time he was arrested and searched by police. In view of the amount of the drugs involved, the trial judge invoked the presumption of trafficking under s 37(da)(xvi) of the DDA against the appellant. The instant appeal was against the conviction and sentence.

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Held, unanimously dismissing the appeal and affirming the conviction and sentence:

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(1) The trial judge was right in invoking the presumption of trafficking against the appellant on finding that the prosecution had established the appellant's mens rea possession over the amount of drugs involved (see paras 4–5).

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(2) To succeed in the appeal, the appellant had to show that the trial judge was plainly wrong either in finding that he had knowledge of the drugs or in finding that he had failed to rebut the presumption of trafficking. Both were questions of fact involving the question of the credibility of the witnesses. The finding of mens rea possession was supported by the evidence and was not perverse and was arrived at after a proper and adequate evaluation of the evidence. A crucial part of the prosecution's evidence was that the appellant had tried to run away and refused to co-operate when SP4 identified himself as a police officer and wanted to inspect the sling bag the appellant was carrying. The trial judge found no

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reason for the police witnesses to fabricate evidence against the appellant as they were merely carrying out their duties. With such evidence before him, the trial judge was perfectly entitled to find that the appellant had knowledge of the drugs especially after having had the audio-visual advantage of seeing and hearing the witnesses testifying and exercising sufficient judicial appreciation of the evidence (see paras 11–12 & 14–17).

(3) The appellant's failure to rebut the presumption of trafficking was fatal, leaving the trial court with no choice but to convict him of the offence. Instead of rebutting the presumption, the appellant's defence was that the drug was not found in the sling bag he was carrying but in the Myvi. Even if this was true, it was not evidence to rebut the presumption. The defence was rejected by the trial judge for the reason that if the drug was found in the Myvi and not in the appellant's physical possession, the police would have arrested the car owner who was with the appellant at the material time. In the absence of evidence to rebut the presumption and the finding that he was in mens rea possession, the appellant had to be convicted on the charge (see paras 22 & 24–25).

(4) There was no misdirection on the law or mishandling of facts by the trial judge and no basis to disturb his finding that the appellant was guilty as charged (see para 27).

[Bahasa Malaysia summary

Perayu telah disabitkan dan dijatuhkan hukuman mati oleh Mahkamah Tinggi kerana mengedar 146.9g methamphetamine, bertentangan dengan s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Mahkamah bicara mendapati bahawa perayu itu mempunyai mens rea pemilikan dadah yang dibawa di dalam beg sandang ketika dia ditangkap dan diperiksa oleh polis. Berdasarkan kepada jumlah dadah yang terlibat, hakim perbicaraan membuat anggapan pengedaran dadah di bawah s 37 (da)(xvi) ADB terhadap perayu. Rayuan ini adalah terhadap sabitan dan hukuman.

Diputuskan, sebulat suara menolak rayuan dan mengekalkan sabitan dan hukuman:

(1) Hakim bicara adalah betul dalam membuat anggapan pengedaran terhadap perayu apabila mendapati pihak pendakwaan telah membuktikan mens rea perayu terhadap jumlah dadah yang terlibat untuk pengedaran (lihat perenggan 4–5).

(2) Untuk berjaya dalam rayuan ini, perayu hendaklah menunjukkan bahawa hakim perbicaraan tersebut benar-benar terkhilaf sama ada dalam membuat dapatan bahawa beliau mempunyai pengetahuan tentang dadah tersebut atau dalam membuat dapatan bahawa beliau telah gagal menyangkal anggapan pengedaran dadah. Kedua-duanya

adalah soalan fakta yang membabitkan kredibiliti saksi. Dapatan mens rea pengedaran telah disokong oleh keterangan dan tanpa niat jahat dan telah didapati selepas penilaian yang betul dan bukti yang mencukupi. Bahagian penting dari bukti pendakwaan adalah bahawa perayu telah cuba melarikan diri dan enggan bekerjasama ketika SP4 mengenalkan diri beliau sebagai pegawai polis dan ingin memeriksa beg sandang yang dibawa oleh perayu. Hakim perbicaraan menolak alasan bagi saksi-saksi polis untuk mereka bukti terhadap perayu kerana mereka hanya melakukan tugas mereka. Dengan keterangan sedemikian di hadapan beliau, hakim perbicaraan berhak untuk membuat dapatan bahawa perayu mempunyai pengetahuan tentang dadah tersebut terutamanya selepas mendapat kelebihan audio-visual untuk melihat dan mendengar saksi-saksi yang memberi keterangan dan melaksanakan apresiasi kehakiman yang cukup terhadap bukti-bukti tersebut (lihat perenggan 11–12 & 14–17).

(3) Kegagalan perayu untuk menyangkal anggapan pengedaran adalah fatal, tanpa memberikan pilihan lain kepada mahkamah selain menjatuhkan hukuman terhadap kesalahan beliau. Selain daripada menyangkal anggapan tersebut, pembelaan perayu adalah bahawa dadah itu tidak dijumpai di dalam beg sling yang dibawa tetapi di dalam Myvi. Sekalipun ini benar, ia bukan bukti untuk menyangkal anggapan itu. Pembelaan telah ditolak oleh hakim perbicaraan atas alasan bahawa jika dadah itu dijumpai di dalam Myvi dan bukan dalam pemilikan fizikal perayu, pihak polis akan menangkap pemilik kereta yang bersama perayu pada masa yang material. Oleh sebab ketiadaan bukti untuk menyangkal anggapan tersebut dan mendapati bahawa ianya berada di dalam milikan beliau, perayu harus disabitkan dengan pertuduhan (lihat perenggan 22 & 24–25).

(4) Tidak ada salah pengertian undang-undang atau penyalahgunaan fakta oleh hakim bicara dan tidak ada alasan untuk mengganggu dapatan bahawa perayu bersalah (lihat perenggan 27).]

Cases referred to

Attan bin Abdul Gani v PP [1970] 2 MLJ 143b (refd)
Lee Ah Seng & Anor v PP [2007] 6 MLJ 1; [2007] 5 CLJ 1, FC (consd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273; [1998] 2 CLJ 70, FC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)
PP v Yuvaraj [1969] 2 MLJ 89; [1968] 1 LNS 116, PC (refd)
PP v Zulkifli bin Arshad [2011] 1 MLJ 599; [2010] 6 CLJ 121, FC (refd)
Tan Kim Ho & Anor v PP [2009] 3 MLJ 151; [2009] 3 CLJ 236, FC (folld)

Legislation referred to

Criminal Procedure Code s 182A(1)
Dangerous Drugs Act 1952 ss 37(d), (da), (da)(xvi), 39B(1)(a)
Prevention of Corruption Act 1971 s 14

Appeal from: Criminal Trial No 45A-46–11 of 2016 (High Court, Pulau Pinang)

Ranjit Singh (Tan Guat Cheng with him) (GC Tan & Co) for the appellant.
Samihah bt Rhazali (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdul Rahman Sebli JCA (delivering judgment of the court):

[1] In the High Court at Pulau Pinang, the appellant was charged with drug trafficking and the charge against him was as follows:

> Bahawa kamu pada 29hb Mac 2016, jam lebih kurang 10.00 malam, di tepi Jalan Kampung Simpah, Mak Mandin, di dalam Daerah Seberang Perai Utara, di dalam Negeri Pulau Pinang, telah mengedar dadah berbahaya iaitu sejumlah 146.9 gram Methamphetamine dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh di hukum di bawah Seksyen 39B(2) Akta yang sama.

[2] He claimed trial to the charge at the conclusion of which he was found guilty and sentenced to death, hence the present appeal. Having heard arguments by both sides, we unanimously dismissed his appeal and affirmed his conviction and sentence. These are the grounds of our decision.

[3] The material facts on which the learned trial judge found the appellant guilty of the offence can be found in the following paragraph of his grounds judgment:

> [69] Saya telah memberikan pertimbangan dan analisa yang sewajarnya ke atas keterangan-keterangan yang telah dikemukakan oleh pihak pendakwaan dan pembelaan yang diketengahkan oleh OKT, saya berpuas hati bahawa semasa OKT ditangkap, OKT sedang membawa beg silang dengan cara disilang di bahu kanan OKT yang diketahui oleh OKT akan isi kandungannya. Hasil daripada pemeriksaan yang dijalankan oleh SP4 ke atas beg tersebut, telah menemui empat bungkusan plastik lutsinar yang di dalam keempat-empat bungkusan tersebut mengandungi dadah yang telah disahkan oleh SP3 sebagai methamphetamine. Ini membuktikan bahawa dadah tersebut berada dalam milikan fizikal OKT tanpa perlu saya bergantung kepada anggapan dibawah s 37(d). Memandangkan dadah tersebut dalam jumlah yang banyak maka saya pasti ia bukan untuk kegunaan sendiri malah saya bergantung kepada anggapan di bawah s 37(da)(xvi) bahawa dadah tersebut dimiliki oleh OKT bagi tujuan pengedaran.

[4] It was a finding by the learned trial judge that the sling bag in which the drug was found was in the physical possession of the appellant and that he knew about the drug. It was a finding that the appellant was in mens rea possession of the drug. In view of the large amount of the drug, the presumption of trafficking under s 37(da)(xvi) of the Dangerous Drugs Act 1952 ('the DDA') applied against the appellant. The provision reads as follows:

> 37 In all proceedings under this Act or any regulations made thereunder —
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> (da) any person who is found in possession of —
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> (xvi) 50 grammes or more in weight of Methamphetamine;
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> otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug;

[5] The learned judge was right in invoking the presumption, which shifted the legal burden to the appellant to prove that the drug was not for the purpose of trafficking rather than for the prosecution to prove that the drug was for the purpose of trafficking. In fact, once the learned judge found that *mens rea* possession had been established by the prosecution, he must invoke the presumption: see *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273; [1998] 2 CLJ 70 (FC); *Public Prosecutor v Zulkifli bin Arshad* [2011] 1 MLJ 599; [2010] 6 CLJ 121 (FC); *Attan bin Abdul Gani v Public Prosecutor* [1970] 2 MLJ 143b (HC).

[6] Where the statutory presumption of trafficking under s 37(da) has been triggered by proof of actual possession (as opposed to presumed possession), there is absolutely no necessity for the court to invoke the presumption of possession and knowledge under s 37(d). There is no such necessity simply because actual evidence of possession and knowledge, the two factual elements presumed by s 37(d) upon proof of custody or control, must already have been established by the prosecution for the presumption under s 37(da) to be applicable. The presumption under s 37(da) cannot be invoked without proof of mens rea possession.

[7] What is prohibited by *Muhammed bin Hassan* is for the court to use the presumption of possession and knowledge under s 37(d) to further invoke the presumption of trafficking under s 37(da), hence the rule against double presumption or presumption upon presumption. Proof of 'possession' for the purpose of s 37(da) must be established by actual evidence direct or circumstantial and not by presumed possession and knowledge under s 37(d).

[8] *Attan bin Abdul Gani* was a case on s 14 of the Prevention of Corruption Act 1971. In dealing with this provision, Sharma J said:

> Once it is proved that the gratification has been paid or received then in the words of s 14 of the Act 'Such gratification shall be deemed to have been paid or given or received corruptly ...' The presumption at once arises under the section. *This presumption is a presumption of law and it is obligatory on the court to raise it* in every proceeding for an offence under s 3 or 4 of the Act *provided* it is proved that the gratification had been paid, given or received. (Emphasis added.)

[9] In the context of a criminal proceeding under s 39B(1)(a) of the DDA, once it is proved that the accused was in mens rea possession of the drug, it is obligatory on the part of the court to raise the presumption of trafficking under s 37(da). Obligatory means compulsory: see the *Concise Oxford English Dictionary* (11th Ed, Revised).

[10] The quantum of proof required to discharge the burden is proof on the balance of probabilities, which is heavier than the evidential burden of merely to cast a reasonable doubt in the prosecution's case. Failure to discharge the burden must result in a conviction: *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89; [1968] 1 LNS 116.

[11] In order to succeed in this appeal, the appellant must show that the learned trial judge was plainly wrong in either of the following findings of fact:

(a) that the appellant had knowledge of the drug; or

(b) that the appellant failed to rebut the presumption of trafficking under s 37(da)(xvi) of the DDA.

[12] Both are questions of fact which no doubt involve the question of the credibility of the witnesses. The guiding principle is that it is no part of the function of the appellate court both in criminal and civil cases to make its own findings of fact. This function is reserved by the law to the trial court: see the Federal Court case of *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457 where the court said at p 406 (MLJ); p 475 (CLJ):

> [24] We were then invited by the learned deputy to make our own findings on the evidence and to restore the conviction entered by the learned trial judge on the basis of the proviso to s 92(1) of the Courts of Judicature Act 1964. Reliance was placed on the decision of this court in *Tunde Apatira*.
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> [25] Now, it is settled law that it is no part of the function of an appellate court in a criminal case — or indeed any case — to make its own findings of fact. That is a function exclusively reserved by the law to the trial court. The reason is obvious. An appellate court is necessarily fettered because it lacks the audio-visual advantage enjoyed by the trial court.
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> [26] The further principle established by this court in *Muhammed Hassan v Public Prosecutor* is that where s 37(da) is relied on by the prosecution, it is for the trial court to make a specific finding that the accused was in possession in the legal sense.

> In the absence of such a finding, it is not open to an appellate court to fill the gap and make the finding. A suggestion by counsel for the prosecution that this court is entitled to make its own findings of fact was firmly rejected.

[13] But of course we are mindful of what the Federal Court said in the later case of *Lee Ah Seng & Anor v Public Prosecutor* [2007] 6 MLJ 1; [2007] 5 CLJ 1, as follows:

> Clearly, an appellate court does not and should not put a brake and not going any further the moment it sees that the trial judge says that that is his finding of facts. It should go further and examine the evidence and the circumstances under which that finding is made to see whether, to borrow the words of HT Ong (CJ Malaya) in *Herchun Singh*'s case ([1964] 2 MLJ 209) 'there are substantial and compelling reasons for disagreeing with the finding'. Otherwise no judgment would ever be reversed on question of fact and the provision of s 87 of the CJA 1964 that an appeal may lie not only on a question of law but also on a question of fact or on a question of mixed fact and law would be meaningless.

[14] We shall first deal with the question whether the learned trial judge's finding on mens rea possession was supported by the evidence, not perverse and was arrived at after a proper and adequate evaluation of the evidence. If that had been the case, then we must defer to the trial court's finding.

[15] The crucial part of the prosecution's evidence which the learned trial judge accepted as the truth was that the appellant tried to run away when SP4 identified himself as a police officer and refused to co-operate when SP4 wanted to inspect the sling bag that he was carrying. In accepting the prosecution's evidence, the learned judge found no reason for the police witnesses to fabricate evidence against the appellant as they were merely carrying out their duties.

[16] With such evidence before him, the learned trial judge was perfectly entitled to come to the finding that the appellant had knowledge of the drug. In order for us to reverse this finding of fact, the appellant must show that the learned judge had failed to take proper advantage of his having seen and heard the witnesses giving evidence.

[17] We were not persuaded that the learned judge had failed to do so. Nor did we find that there was insufficient judicial appreciation of the evidence. Therefore, we rejected learned counsel's contention that the learned trial judge was wrong in finding that the appellant knew about the drug.

[18] As to the question whether the appellant had succeeded in rebutting the presumption of trafficking under s 37(da)(xvi) of the DDA, the learned trial judge after directing his mind to the principle laid down by the Federal Court

in *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169 went on to evaluate the evidence given by the appellant and his witness (SD2) and found, rightly in our view, that the appellant's defence deviated from the defence that he put to the prosecution witnesses during their cross-sexamination at the prosecution stage of the case.

[19] It was for this reason that the learned judge found the appellant's defence to be a bare denial although his explanation was lengthy. In any event, he learned judge found that the explanation did not raise any reasonable doubt in his mind as to the truth of the prosecution's case. We found nothing wrong with this finding. On this point, the Federal Court's observations in *Tan Kim Ho & Anor v Public Prosecutor* [2009] 3 MLJ 151; [2009] 3 CLJ 236 are instructive:

> [33] In our adversarial system of justice, the duty of each party is to show that his case is the truth. This is done by him adducing his own witnesses to support his contention. When it is the plaintiff or prosecutor who is adducing the evidence, his witnesses are subject to cross examination by the defence or the accused person. When a prosecution witness makes a statement of fact which is disagreed to by the defence it becomes the defence's duty to, in whatever way, put to the plaintiff or prosecution witness that what the witness has said is not true. In addition, he could also use the plaintiff's or prosecution's witnesses to adduce evidence to support his defence and to indicate what his defence is. This he is required to do to enable the plaintiff or prosecution to bring out evidence to disprove what the defence intends to adduce. If the defence does not in any way indicate by cross examination of those facts, those statements by the plaintiff's or prosecution witnesses must be accepted as true. Even if the plaintiff's or prosecution's witness does not say anything relating to the defence case, it is still the duty of the defence to bring out his case during the plaintiff's or prosecution's case. In fact this duty to disclose his defence during the prosecution's case is more relevant in criminal cases than in civil. This is particularly so when the plaintiff or prosecution's witness is relevant to the fact in issue. In criminal cases, the prosecution does not know what the defence is going to be, except in alibi, until the defence adduces its evidence.
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> [34] The failure of a party to put questions to his opponent's material witnesses in cross-examination is said by Gopal Sri Ram JCA in *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 to be an abandonment of the pleaded case and may be barred from raising it in argument thereafter.

[20] It is pertinent to note that the appellant did not raise as his defence that the drug was not for the purpose of trafficking, although the burden was on him to rebut the presumption of trafficking under s 37(da)(xvi) of the DDA. Rather, his defence was that the drug was not found in the sling bag that he was carrying but was found in the Myvi.

[21] It was a defence that he was not even in physical possession of the drug

at the time of his arrest, let alone to be trafficking in the drug. If true, the presumption of trafficking under s 37(da)(xvi) of the DDA did not even apply against him as physical possession with knowledge or mens rea possession is a factual prerequisite for the invocation of the presumption.

[22] Subject to what we have to say in a moment on the appellant's line of defence, the failure by the appellant to adduce any evidence to discharge his legal burden of proving that the drug was not for the purpose of trafficking is fatal because by such failure, there was no material before the court for the learned judge to make a finding that the presumption of trafficking under s 37(da)(xvi) of the DDA had been rebutted by the appellant. Evidence that the drug was not found in the appellant's possession but in the Myvi, even if true, is not evidence in rebuttal of the presumption.

[23] Be that as it may, the appellant would still be entitled to an acquittal if he succeeded in raising a real and reasonable doubt in the court's mind as to whether or not the drug was in his physical possession at the time of his arrest. It is the lighter evidential burden of merely to introduce evidence which does not require proof on the balance of probabilities, unlike the requirement to rebut the presumption under s 37(da) of the DDA.

[24] The defence was however rejected by the learned trial judge for the reason that if indeed the drug was found in the Myvi and not in the appellant's physical possession as claimed by him, the police would have arrested the car owner, one Siew Chee Wei who was with the appellant at the material time.

[25] The legal position therefore remains that the appellant was in mens rea possession of the drug and he failed to discharge his burden of proof under s 37(da)(xvi) of the DDA that the drug was not for the purpose of trafficking. It must follow that he must be convicted of the offence charged: *Public Prosecutor v Yuvaraj*.

[26] The grounds of judgment shows that in finding the appellant guilty of the offence charged, the learned trial judge had carefully and meticulously evaluated the entire evidence as required by s 182A(1) of the Criminal Procedure Code. He was clear on the issues of law involved and the evidence that was required to establish facts necessary to bring home the charge against the appellant.

[27] There was no misdirection on the law, nor was there mishandling of the facts by the learned trial judge. There was in the circumstances no basis for us to disturb the finding of guilt by the learned judge.

[28] It was for all the reasons aforesaid that we found the conviction to be

safe. Accordingly, we dismissed the appeal and affirmed the conviction and sentence.

Apepal unanimously dismissed; conviction and sentence affirmed.

Reported by Ashok Kumar